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SUPREME COURT OF THE UNITED STATES

petition not granted

JERRY McCABE _____ *Petitioner*

v. No. 1323

STATE OF ARKANSAS _____ *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR RESPONDENT

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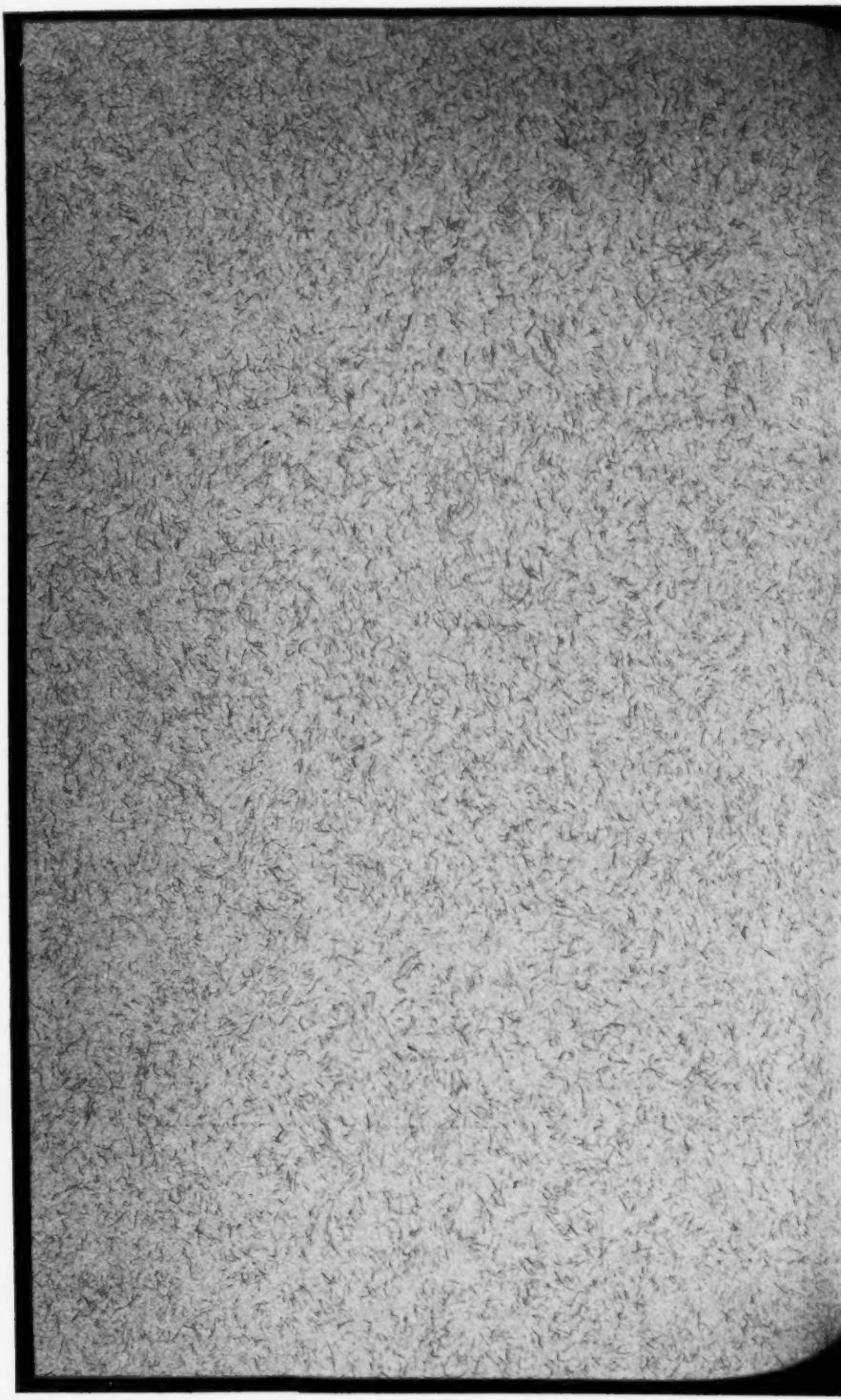

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BRIEF FOR RESPONDENT

RESPONDENT'S STATEMENT OF THE CASE

Counsel for petitioner in both his petition and his brief has set forth the testimony given in the Sebastian Circuit Court, the action taken thereon by the Circuit Judge, and has furnished to the Court in the record, the exact page of which has not been furnished us, the opinion of the Supreme Court of Arkansas affirming the case.

There is only one question involved, which is set forth immediately hereunder.

The Question Presented

The sole question presented by petitioner is whether the trial court's actions in refusing to grant a mistrial and the action of the Supreme Court of Arkansas in affirming the trial court's judgment operated to permit petitioner's conviction without due process of law in violation of the 14th Amendment to the Federal Constitution.

ARGUMENT

I

No Federal Question is Properly before this Court and Consequently, the Petition for Writ of Certiorari Should Be Denied

In a great number of cases, including among them *Ark. So. Ry. Co.* v. *German National Bank* (Ark. 1907), 28 S. Ct. 78, 207 U. S. 270, 52 L. Ed. 201, and *St. L. I. M. & So. Ry. Co.* v. *Taylor* (Ark. 1908), 28 S. Ct. 616, 210 U. S. 281, 62 L. Ed. 1061, this Court has consistently held that in order to give this Court jurisdiction it must appear affirmatively, not only that the Federal question was presented for decision, but that its decision was necessary to a determination of the cause, and that it was actually decided, or that the judgment could not have been given without deciding it. 28 U.S.C.A. 344 (49).

The only place in the record (record page number not furnished us) that the question of whether petitioner was denied due process of law is found in the Motion for a New Trial presented to the Sebastian Circuit Court. Petitioner did not argue the Federal question in his brief which was filed in the Supreme Court of Arkansas and the Supreme Court in its opinion did not decide the case on that point, did not even mention it, and it was not necessary that it be decided by the Supreme Court of Arkansas. It, therefore, appears that this Court should not exercise its discretion and grant this petition.

All that is actually involved here is a question of evidence, nothing more, and petitioner has not furnished us nor this Court with any authority showing otherwise. As

a matter of fact, it boils down even further as being a case involving the weight of the evidence, and this is a further reason why this Court should not grant this petition.

In *Barrington* v. *Missouri* (Mo. 1907), 205 U. S. 483, 27 S. Ct. 582, 51 L. Ed. 890, this Court said that the admission of evidence in criminal cases which the highest State Court decided did not violate the rights of the accused under the State Constitution and laws cannot involve a question of due process of law of sufficient merit to sustain a writ of error. 28 U.S.C.A. 344 (90). Since it is not sufficient to sustain a writ of error it follows that it is not sufficient to sustain a petition for writ of certiorari.

In the instant case the Supreme Court of Arkansas specifically said:

> "What the Constitution guarantees, and a right Courts guard with meticulous care, is that every defendant against whom criminal accusations have been made is given 'a fair and impartial trial'. McCabe, Sloan, and Mondier, although jointly informed against, procured severance, and each was entitled to resulting benefits. By taking the reasonable man's viewpoint (assuming such exists) and considering the conditions under which objectionable testimony was brought out, we cannot believe that the jury regarded the identification by Shaw as substantive evidence or that its verdict turned upon this incident."

This is the only place in the opinion of the Supreme Court of Arkansas where the Constitution was mentioned and there the Court referred to the Constitution of the State of Arkansas, and then only to the extent that under said Constitution a man was guaranteed a fair and impartial trial.

To support our statement herein that the case boiled down to the weight of the evidence, we quote further from the opinion of the Supreme Court of Arkansas:

> "It is highly improbable that the verdict rested alone upon what Gerald Bradley said, that the jury convicted him without considering circumstances and facts within themselves sufficient."

This Court held, in *Whitney* v. *People of State of California* (Calif. 1927), 47 S. Ct. 641, 274 U. S. 357, 71 L. Ed. 1095, that objection that defendant convicted of violation of California Criminal Syndicalism Act (St. 1919, p. 281) was denied due process of law in violation of Constitutional U. S. Amendment 14 by being convicted of acts which became unlawful by reason of evidence following, held in effect an effort to review the weight of the evidence, and not properly reviewable in S. Ct.

> "It is elementary and needs no citation of authority to show that the due process clause of the Fourteenth Amendment does not control methods of state procedure or give jurisdiction to this Court to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters non-federal in character." *McDonald* v. *Oregon, etc., Nav. Co.* (Or. 1914), 233 U. S. 665, 34 S. Ct. 772, 58 L. Ed. 1145. See also 28 U.S.C.A. 344 (114).

CONCLUSION

From the foregoing authorities it is apparent that this petition should be denied. No Federal question was properly raised, no Federal question was decided and it was not necessary in deciding the case for the Supreme Court of the State of Arkansas to decide this Federal question. There is involved here only a question as to weight of the evidence.

We, therefore, respectfully submit that petition for Writ of Certiorari herein should be denied.

Respectfully submitted

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